

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY)	
)	
Annual formula rate update and revenue requirement)	Docket No. 14-0312
reconciliation under Section 16-108.5 of the)	
Public Utilities Act.)	

**INITIAL BRIEF OF
THE PEOPLE OF THE STATE OF ILLINOIS**

The People of the State of Illinois

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The People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois, hereby file their Initial Brief in the above-captioned proceeding.

I. INTRODUCTION / STATEMENT OF THE CASE

A. Legal Standard

This docket involves Commonwealth Edison Company’s (“ComEd” or “the Company”) annual formula rate update, filed on April 16, 2014, under the Energy Infrastructure Modernization Act (“EIMA”), 220 ILCS 5/16-108.5, enacted October 23, 2011 and amended effective May 22, 2013 by Public Act 98-0015. EIMA authorizes electric utilities to change their rates every year based on a regulatory framework that includes a return on equity determined by the statute, a ten year investment commitment, a jobs commitment, establishment of a low income customer assistance fund, performance metrics, and an annual retrospective reconciliation of the revenue requirement and actual costs.¹ 220 ILCS 5/16-108.5(b) & (c).

Section 16-108.5(d) provides that “[e]ach such filing shall conform to the following requirements and include the following information:

¹ “Actual costs” are adjusted from recorded values to exclude costs recovered through rate riders, to exclude costs allocable to ComEd’s FERC jurisdiction and to exclude costs that should be disallowed for ratemaking purposes as not prudent and reasonable.

(1) The inputs to the performance-based formula rate for the applicable rate year shall be based on final historical data reflected in the utility's most recently filed annual FERC Form 1 plus projected plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the inputs are filed. The filing shall also include a reconciliation of the revenue requirement that was in effect for the prior rate year (as set by the cost inputs for the prior rate year) with the actual revenue requirement for the prior rate year (determined using a year-end rate base) that uses amounts reflected in the applicable FERC Form 1 that reports the actual costs for the prior rate year. Any over-collection or under-collection indicated by such reconciliation shall be reflected as a credit against, or recovered as an additional charge to, respectively, with interest calculated at a rate equal to the utility's weighted average cost of capital approved by the Commission for the prior rate year, the charges for the applicable rate year.

220 ILCS 5/16-108.5(d), (d)(1).

This EIMA subsection also provides that each “filing shall include relevant and necessary data and documentation for the applicable rate year that is consistent with the Commission’s rules applicable to a filing for a general increase in rates or any rules adopted by the Commission to implement this Section.” 220 ILCS 5/16-108.5(d)(3). Importantly, EIMA did *not* change the Commission’s authority to investigate and review a utility’s costs to assure that they are prudent and reasonable, authorizing the Commission to:

...enter upon a hearing concerning the *prudence and reasonableness of the costs incurred by the utility* to be recovered during the applicable rate year that are reflected in the inputs to the performance-based rate derived from the utility’s FERC Form 1....*The Commission shall apply the same evidentiary standards, including, but not limited to, those concerning the prudence and reasonableness of the costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of this Act.*

220 ILCS 5/16-108.5(d)(3)(emphasis added).

A finding of imprudence and unreasonableness must be based on substantial evidence,

meaning "more than a mere scintilla; however, it does not have to rise to the level of a preponderance of the evidence. It is evidence that a reasoning mind would accept as sufficient to support a particular conclusion." *Commonwealth Edison Co. v. Illinois Commerce Commission*, 405 Ill.App.3d 389, 398 (2010) (internal quotations and citations omitted). Costs that are unnecessary to the provision of service, or that the utility has not justified in amount are not reasonable or prudent. *Id.* (employee costs related to the merger activities of the utility's parent not necessary to utility service, and the position that the employees worked on the merger for "free" was not credible).

B. Procedural History

In 2012, the Commission entered two formula rate orders relative to ComEd. The first, ICC Docket No. 11-0721, established the terms of the formula rate tariff under EIMA, and the Company's revenue requirements based on the historical FERC Form 1 filing for 2010 and projected plant additions for 2011.² In Docket No. 12-0321, the Commission established a new revenue requirement for ComEd that took effect on January 1, 2013 based on the Company's historical FERC Form 1 reports for 2011 and projected plant additions for 2012, and a reconciliation of the revenue requirement set in Docket 11-0721 with ComEd's actual costs for 2011. Both of those decisions have been affirmed on appeal. *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 2014 IL App (1st) 122860 (March 26, 2014); *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 2014 IL App (1st) 130302 (June 30, 2014).

² ICC Docket No. 11-0721, Order of May 24, 2012, Order on Rehearing of October 2, 2012. The May 29, 2011 Order was subject to rehearing on three issues, and the Order on Rehearing was issued on October 2, 2011. The Order on Rehearing established a new treatment for "pension asset," concluded that the reconciliation formula will use an average rate base in determining reconciliation capital costs, and approved the use of the short term interest rate to the reconciliation balance credit or charge.

In Docket No. 13-0318, the Commission established ComEd's rates effective January 1, 2014 based on the data reported in its historical FERC Form 1 filing for 2012, projected plant additions for 2013, and a reconciliation of the revenue requirement set in Docket No. 12-0321 with ComEd's actual costs for 2012. The Commission also considered changes to the formula in Docket No. 13-0386 and Docket No. 13-0553 (cons.), including the People's proposal to limit the application of interest to the reconciliation balance net of deferred taxes that will not be paid until the reconciliation revenues are collected. While the Commission declined to adopt the People's recommendation in that case, it recognized that the People's "concept is consistent with Generally Accepted Accounting Principles, is consistent with standard regulatory practice that matches ADIT elements to the associated assets included in rate base and properly recognizes the cash benefit to the utility that would otherwise have been paid out for income taxes on the amount." Docket No. 13-0553, *Commonwealth Edison Co.*, Final Order at 43 (Nov. 26, 2013). In this docket the People's witnesses have further shown how their recommendation to limit the application of interest to the net-of-tax reconciliation balance reflects actual cost, is consistent with standard regulatory practice, and is consistent with EIMA.

The other issues the People will address in this docket are their adjustment to remove Annual Incentive Plan (or "AIP") incentive compensation costs that are based on Exelon's earnings per share through the "Shareholder Protection Feature," and their adjustment to billing determinants.

II. OVERALL REVENUE REQUIREMENT

A. 2015 INITIAL RATE YEAR REVENUE REQUIREMENT

In this case, ComEd has requested an overall increase in revenues of \$269,468,000, which represents an 11.5% increase over the authorized 2014 net revenue requirement. This increase, shown on ComEd Ex. 13.01, Schedule FR A-1, is calculated by ComEd as follows³:

	\$2,361.6 million	prospective revenue requirement for 2015 (line 23);
+	\$257.6 million	reconciliation of 2013 actual costs compared to the 2013
		revenue requirement set in Docket No. 13-0318, plus
		interest (line 24);
-	\$0 million	collar adjustment (line 35);
	<hr/>	<hr/>
	\$2,619 million	total net 2014 revenue requirement per ComEd (line 36);
-	\$2,349 million	2014 net revenue requirement (line 37);
	<hr/>	<hr/>
	\$ 269.5 million	overall increase in net revenues (line 38)

As discussed in the body of this Initial Brief, the People recommend downward adjustments to ComEd's claimed revenue requirement to remove costs associated with its Annual Incentive Plan compensation program that violate Section 16-108.5(c)(4)(A) of EIMA of \$39.145 million in revenue requirement, representing a rate base adjustment of \$24.103 million and an expense adjustment of \$36.730 million. The People also recommend elimination of costs associated with ComEd's Long Term Performance Share Award Program that were not self-disallowed in the Company's filing, reducing revenue requirement by another \$0.187 million.

B. 2013 RECONCILIATION ADJUSTMENT

In a major change from standard ratemaking, EIMA authorizes electric utilities to include a reconciliation or "true-up" of their actual costs so that consumers pay any revenue shortfall in a given rate year in a later year. 220 ILCS 5/16-108.5(d). In this docket, ComEd's actual costs for

³ ComEd Ex. 13.01, Schedule FR A-1.

2013 exceeded the authorized revenue requirement collected in 2013 by \$223,865,000. ComEd Ex. 13.1, Sch. FR A-4. Line 1e. ComEd applied interest at a rate equal to its weighted average cost of capital (7.04%), which increased the reconciliation adjustment by \$33,759,000 to a total of \$257,621,000. *Id.* at Lines 2, 31. This reconciliation adjustment equals 96% of the \$269.5 million revenue requirement increase ComEd has requested for 2015.

The People recommend that the Commission revisit its application of interest to the reconciliation balance. AG witness David J. Effron recommends that interest only be applied to the net of tax portion of the \$223,865,000 reconciliation amount. Assuming no changes to the reconciliation amount, this would reduce the reconciliation amount to which interest is applied to \$133,293,000⁴ and reduce the total reconciliation adjustment (with interest) to \$246,692,000. AG Ex. 2.0 at 11.

In the alternative and only if the Commission declines to adopt Mr. Effron's recommendation, the AG witness Michael L Brosch recommends that the Commission include in its Accumulated Deferred Income Tax (ADIT) adjustment, the \$152,562,000 that ComEd has identified as stemming from the deferred recovery of the reconciliation revenues. AG Exs. 1.0C2 and 3.0C. While this approach is not as precise as Mr. Effron's recommendation, it assures that the ADIT associated with the delivery services reconciliation is properly accounted for as part of delivery services revenue requirement.

C. ROE COLLAR

Pursuant to the formula rate, in 2013, ComEd's authorized return on equity ("ROE") was 9.25%. ComEd Ex. 13.1, Sch. FR D-1, line 9. However, ComEd missed one performance measure, resulting in a statutory penalty of .05% (or five basis points). ComEd. Ex. 2.0 at 11.

⁴ This amount is based on a 41.175% combined income tax rate. AG Ex. 2.0 at 11; ComEd Ex. 3.01 at 13 (Sch FR C-4), line 4.

ComEd reported a 9.53% return on equity for shareholders, exceeding its performance adjusted 9.20% by .33% (33 basis points) and falling 17 basis points below the maximum allowed ROE of 9.70%. ComEd Ex. 13.1, Sch. FR A-1, lines 25-26. Given the .5% (50 basis points) ROE collar, 220 ILCS 5/16-108.5(f-5)(A), ComEd's ROE was not affected by the missed performance measure and no accounting adjustment was made to the revenue requirement.

D. 2015 NET RATE YEAR REVENUE REQUIREMENT

ComEd has requested a 2015 revenue requirement of \$2,619,210,000. ComEd Ex. 13. 1, Sch. FR A-1, Line 36. The People recommend adjustments on the following issues:

- Incentive compensation
- Interest on the reconciliation balance or ADIT associated with the reconciliation revenues
- Billing determinants.

The People will not present argument or comment on other adjustments recommended by other parties. However, this should not be taken as an opposition to or lack of agreement with those adjustments.

III. SCOPE OF PROCEEDING

A. CHANGES TO THE STRUCTURE OR PROTOCOLS OF THE PERFORMANCE-BASED FORMULA RATE

B. THE DEFINITION OF RATE YEAR AND THE RECONCILIATION CYCLE

C. ORIGINAL COST FINDING

D. ISSUES PENDING ON APPEAL

As indicated above, the Appellate Court has issued decisions in two of the last three formula rate cases appealed by ComEd. In both of those appeals (of Dockets 11-0721 and 12-0321), ComEd challenged the Commission's decision to adopt AG witness Effron's recommended adjustment to billing determinants to reflect the customer growth reflected in ComEd's plant additions. The Court in its review of Docket 11-0721 affirmed the Commission's adjustment of billing determinants as recommended by the People, and held that ComEd had "not met its burden of proving that the Commission had violated the Act when it required an adjustment of ComEd's rates to take into account expected growth in the number of customers it served." 2014 IL App. (1st) 122860, ¶ 57. The Court also affirmed the Commission's rejection of ComEd's argument that it should have also adjusted the number of kWh consumed per customers. *Id.* at ¶ 58. In its review of Docket No. 12-0321, the Appellate Court reaffirmed its decision on billing determinants, and held that its "opinion deciding the 2011 Rate Case settled the legal issues that the Commission can use projected new business plant additions in establishing ComEd's rate, and the Commission is not required to also account for usage without any proof of what the cause is for the change in usage." 2014 IL App (1st) 130302, ¶ 57.

While ComEd witness Christine Brinkman continued to contest the billing determinants adjustment recommended by AG witness Effron, the Appellate Court has made it clear that this

adjustment is lawful under EIMA and ComEd is collaterally estopped from challenging it further.

A second issue on appeal is whether the Commission has the discretion under EIMA to calculate the reconciliation adjustment so that interest is applied to a net-of-tax balance. While the Commission rejected the People's proposed adjustment in Docket Nos. 13-0553 and 13-0318, it stated that it would revisit the issue if "further arguments from the parties are presented or clarity from the legislature is provided on this topic." Docket No. 13-0553, Final Order at 43 (Nov. 26, 2013). The Appellate Court has not ruled on the issue yet. *See* IL App. Case No. 1-14-0114 (consolidated appeals).

IV. RATE BASE

C. POTENTIALLY CONTESTED ISSUES

2. Other

The People recommend adjustments to rate base associated with their adjustments to the Annual Incentive Plan and Long Term Incentive and Other Compensation plans. The rate base adjustment is associated with the incentive compensation expense adjustments and will be discussed in section V.C.2. below.

The People also recommend, as an alternative adjustment to applying interest to the net-of-tax reconciliation under-collection discussed in section VII.B.1 below, that the ADIT associated with the delayed recovery and taxation of reconciliation revenues be deducted from rate base, in the same manner as other ADIT balances recognized within rate base applicable to the delivery services jurisdiction. This adjustment is discussed in section VII.B. below.

V. OPERATING EXPENSES

C. Potentially Contested Issues

1. Depreciation for the Filing Year Revenue Requirement
2. Incentive Compensation Program Expenses
 - a. Annual Incentive Program (“AIP”)

Overview of Incentive Compensation Issue

Pursuant to the rebuttal testimony of AG witness Brosch (AG Ex. 3.0C at 30:672-677; AG Ex. 3.1 at 2), the People recommend disallowing 100% of ComEd’s Annual Incentive Plan (“AIP”) expense (including that allocated from Exelon Business Services Company) for 2013, with a revenue requirement impact of \$39,145,065 in each of the reconciliation year revenue requirement *and* the initial rate year revenue requirement. The parts of this brief that follow will provide a factual overview of the AIP and its associated Shareholder Protection Feature (“SPF”); explain how the Shareholder Protection Feature may affect employee motivation; explore ComEd’s purported motives for offering the Shareholder Protection Feature; and finally, show why the Shareholder Protection Feature violates the Public Utilities Act and, under Commission precedent and prevailing statutory construction, makes 100% of 2013 AIP costs non-recoverable.

Factual Overview of the AIP and Shareholder Protection Feature

The structure of ComEd’s AIP and its associated Shareholder Protection Feature are largely undisputed. The following paragraphs will describe what the record evidence shows about the AIP and SPF. As a guide to some of the citations below, it should be noted that AG Exhibit 3.6 at 2-8 contains the formal plan document that governs all AIP programs at Exelon Corp. operating companies, including ComEd; ComEd Exhibit 2.01 contains the informational guide to the ComEd AIP that is distributed to ComEd employees; and AG Exhibit 1.7 at 2-12

contains the informational guide to the Exelon AIP, including the Shareholder Protection Feature that applies to ComEd's AIP.⁵

The AIP provides what ComEd calls "pay at risk" (ComEd Ex. 18.0 (Rev.) at 4:65-76) to all ComEd employees based on achievement of Key Performance Indicators ("KPIs") related to ComEd operational performance. AG Ex. 1.7 at 5; ComEd Ex. 2.01 at 3. The ComEd AIP in 2013 had eight operational metrics, two of which related to ComEd cost controls and six of which related to ComEd operations. ComEd Ex. 2.0 at 17:349. An aggregate index of the eight operational KPIs, ranging from 50% to 200%, is calculated and called the Company Performance Multiplier. AG Ex. 1.7 at 5, 11. In order to determine the actual AIP payout for an employee, Company Performance Multiplier is then multiplied against a percentage of the employee's incentive-eligible base salary referred to as the "target opportunity" that can range up to 30% depending on seniority and job type. AG Ex. 1.7 at 3; Tr. at 258:1-3, 271:3-7. Non-represented employees, who represent 38.3 percent of the ComEd employee base (AG Cross Exhibit 14 at 1), also have their AIP payout multiplied by an additional index, known as the Individual Performance Multiplier (AG Ex. 1.7 at 2), based on certain individual achievements, that ranges from 50% up to 120%. AG Ex. 1.7 at 2, 8; Tr. at 258:10-14, 272:4-5.⁶ Although the Company Performance Multiplier could be reduced to zero if KPI achievement is poor, it (and thus incentive pay) can never be negative; that is, AIP incentive pay can only increase and would

⁵ Asked during cross-examination whether any other formal plan document governing the ComEd AIP exists besides the Exelon AIP formal plan document shown in AG Exhibit 3.6, Mr. Prescott stated that "I don't believe there is one. This document is intended to function as an umbrella document that covers the plans that are in place at the various operating companies." Tr. at 280:16.

⁶ As Mr. Prescott stated during cross-examination, the Individual Performance Multiplier times the Company Performance Multiplier will be reduced to 200 percent if it exceeds 200 percent, although that limit is not relevant to this proceeding. Tr. at 272:22-273:3.

never *reduce* base salary, as ComEd witness Wathen confirmed during cross-examination. Tr. at 111:20-112:2.

In summary, AIP pay before considering the Shareholder Protection Feature is calculated according to the following formula, described at AG Exhibit 1.7 at 3:

Employee's Incentive-Eligible Salary	X	Target Incentive Opportunity Percentage	X	Company Performance Multiplier	X	Individual Performance Multiplier (for only non-represented employees)
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The calculation of the Company Performance Multiplier and the additional Individual Performance Multiplier are not the final word on actual AIP incentive pay, however. The Shareholder Protection Feature, which impacts the amount of AIP incentive payouts depending on the realized value of Exelon Corp. non-GAAP⁷ earnings per share (“EPS”), applies to all ComEd employees⁸, as Ms. Brinkman stated in her direct testimony. ComEd Ex. 2.0 at 17:349. Put simply, “[t]he Shareholder Protection [F]eature is based on EPS,” as ComEd witness Mr. Brookins stated in a discovery response. AG Cross Exhibit 14 at 3. In 2013, the Shareholder Protection Feature set a “threshold” level of Exelon Corporation’s non-GAAP earnings per share of \$2.22, a “target” level of \$2.49, and a “distinguished” level of \$2.72. AG Ex. 1.7 at 4; AG Ex. 3.5 at 1. Exelon Corp. earnings per share achievement of \$2.49 would be deemed 100% achievement for purposes of the Shareholder Protection Feature, while \$2.22 would be deemed 50% achievement and \$2.72 or above would be deemed 200% achievement. AG Ex. 1.7 at 4; AG Ex. 3.5 at 1. (These percentages are apparently assigned somewhat arbitrarily to the

⁷ GAAP stands for Generally Accepted Accounting Principles.

⁸ The Shareholder Protection Feature also applies to all AIP pay paid to Exelon Business Services Company employees, some of which has been included in ComEd’s asserted revenue requirement in this proceeding. Tr. at 277:21-278:3.

“threshold”, “target”, and “distinguished” levels and do not appear to represent a linear relationship; \$2.72 is not double \$2.49, and \$2.49 is not double \$2.22.) When actual Exelon non-GAAP earnings per share is realized and measured at the end of each year, the value is interpolated along the scale from \$2.22 to \$2.72 to determine the percentage performance, from 50% to 200%, for purposes of the Shareholder Protection Feature.⁹ *Under the terms of the Shareholder Protection Feature, the Company Performance Multiplier cannot exceed the Exelon Corp. earnings per share percentage performance by more than 20 percentage points; any Company Performance Multiplier that exceeds such a limit will be reduced down to the cap equal to the EPS percentage plus 20 percentage points.* AG Ex. 1.7 at 7. However, for Exelon Corp. earnings per share achievement below the threshold value of \$2.22, instead of the ordinary rule regarding 20 percentage points, AIP payout is reduced to zero no matter what the Company Performance Multiplier is (“[t]hreshold or higher EPS performance is required for any payout to occur under the AIP”). AG Ex. 1.7 at 7¹⁰. The Shareholder Protection Feature thus can potentially reduce actual AIP payout to zero regardless of how well KPIs are met, as Mr. Brosch noted in his rebuttal testimony (AG Ex. 3.0C at 21:476-478) and Ms. Brinkman also admitted in her rebuttal testimony (ComEd Ex. 12.0 (Rev.) at 7:136-139) and during cross-examination (Tr. at 167:7-168:5).

The threshold, target, and distinguished levels of Exelon Corp. earnings per share in the Shareholder Protection Feature are set each year according to a “very lengthy and involved process” based on projected budgets and revenues, according to ComEd witness Mr. Prescott. Tr. at 262:11-263:7. The threshold level is set so as to be “approximately achievable 90 percent

⁹ ComEd explained the interpolation procedure in a discovery response shown at AG Exhibit 3.5 at 2.

¹⁰ ComEd also admitted the same in a discovery response (AG Ex. 3.4 at 2), and Ms. Brinkman admitted the same under cross-examination (Tr. at 167:16-168:5).

of the time” while the target level is achievable “40 to 50 percent of the time” and the distinguished level is achievable “10 percent of the time”, according to Mr. Prescott. Tr. at 263:21-264:4. In other words, from an *ex ante* perspective, the threshold EPS level in the Shareholder Protection Feature is set so that actual AIP pay will be reduced to zero (i.e. the threshold EPS level will not be achieved) with 10 percent probability, no matter what is the achievement level of operational KPIs within ComEd. While employees may not have been aware of that probability distribution in the past, it is notable that ComEd designs the AIP program to impose such significant risk on employee pay based on a metric that they have little control over.

The Shareholder Protection Feature’s Actual Operation Impacted 2013 Employee Pay.

As ComEd indicated in testimony and in discovery responses, the Company Performance Multiplier calculated in 2013 based on the operational KPIs in 2013 was 140.39%. However, because the calculated non-GAAP level of Exelon Corp. earnings per share for 2013 was \$2.50, which fell slightly above the “target” earnings per share level of \$2.49 set in the Shareholder Protection Feature, the interpolated level of earnings per share achievement was 104.35%. Because the Shareholder Protection Feature dictates that the Company Performance Multiplier cannot exceed Exelon earnings per share performance by more than 20 percentage points, the *effective Company Performance Multiplier was reduced due to the Shareholder Protection Feature* from 140.39%¹¹ to 124.35% (20 percentage points above 104.35%).¹² ComEd Ex. 2.0 at 23:472-475; AG Ex. 3.4 at 3; AG Ex. 3.5.

¹¹ 140.39% (multiplied by the target opportunity percentage, multiplied by incentive-eligible salary) would have been the amount of AIP payout for represented employees who do not have an Individual Performance Multiplier. For non-represented employees, their AIP payout would have been 140.39% times their Individual Performance Multiplier times their target opportunity times their incentive-eligible salary. In both cases, the 140.39% was replaced by 124.35%.

The Shareholder Protection Feature, which no ComEd witness denies is based on Exelon's EPS, thus directly affected ComEd 's 2013 AIP payout by the amount of approximately \$8.5 million. ComEd Ex. 12.0 at 6:117-118. As ComEd witness Mr. Prescott described it during cross-examination, "in 2013 the limiter was invoked and it curtailed the final determination of payout." Tr. at 260:6-8. *See also* Tr. at 261:21 ("did it reduce the award, then my answer would be yes"), Tr. at 276:7-10 (Exelon EPS "is a factor that limits payouts"), and Tr. at 295:17-18 ("[t]he limiter is based on EPS"). ComEd witness Brookins agreed on this point during cross-examination: "[t]he Shareholder Protection Feature is designed to limit the payout . . . to ComEd employees based on earnings per share. The limit is based upon earnings per share of Exelon." Tr. at 315:1-4. Ms. Brinkman also agreed during cross-examination that, in 2013, the Shareholder Protection Feature operated to reduce ComEd's incentive compensation expense¹³ below what it would have been if, hypothetically, there were no Shareholder Protection Feature. Tr. at 242:13-243:9.

¹² Staff witness Mr. Bridal provided a useful table in his rebuttal testimony, which the People reproduce immediately below, showing how the Shareholder Protection Feature might reduce AIP incentive pay under various hypothetical realizations of Exelon EPS. Staff Ex. 8.0 at 20:451.

Table 1.

Actual EPS (A)	Actual EPS Percentage³⁶ (B)	SPF Tolerance (C)	SPF Max AIP Payout (D=B+C)	Actual ComEd KPI Performance (E)	ComEd AIP Final Payout (F=lesser of D or E)
< \$2.22	0% ³⁷	0%	0.0%	140.4%	0.0%
\$2.30	64.8%	20%	84.8%	140.4%	84.8%
\$2.50	104.4%	20%	124.4%	140.4%	124.4%
\$2.67	178.3%	20%	198.3%	140.4%	140.4%

¹³ Ms. Brinkman admitted during cross-examination that the 2013 incentive compensation expense that ComEd seeks to recover in this proceeding is the amount that was actually paid out after consideration of the Shareholder Protection Feature, not the amount that was "funded", as Ms. Brinkman used the term in her testimony (e.g. ComEd Ex. 12.0 (Rev.) at 6:128) solely by consideration of the Company Performance Multiplier. Tr. at 165:16-166:2.

Not only does the Shareholder Protection Feature impact AIP payouts in a direct way, but it designed to be highly sensitive to the ultimate achieved value of Exelon EPS. As Mr. Brosch noted in his rebuttal testimony, if Exelon Corp.'s actual earnings per share had been just four cents higher in 2013, at \$2.54 instead of \$2.50, the calculated EPS percentage for purposes of the Shareholder Protection Feature would have been 121.74% and thus the maximum allowed Company Performance Multiplier would have been 141.74% – meaning that the actual Company Performance Multiplier of 140.39% would not have been reduced or limited. AG Ex. 3.0C at 23:519-523.

Ms. Brinkman further confirmed that the Shareholder Protection Feature is calibrated to reflect even slight changes in Exelon EPS when she considered a related hypothetical question during her cross-examination. She agreed that if Exelon Corp. non-GAAP earnings per share were incorrectly determined on December 31, 2013 to be \$2.21, then the incorrect value of actual AIP payout determined pursuant to that incorrect EPS value would be zero, even if KPIs for the year were met and the Company Performance Multiplier were positive. Tr. at 169:2-22. As a further hypothetical, if the very next day the EPS calculation were re-evaluated and correctly determined to be \$2.22, then, as Ms. Brinkman agreed, the actual, corrected value of AIP payout would be some positive amount above zero, representing a “positive adjustment” from what was previously wrongfully calculated. Tr. at 170:2-173:10. The record evidence is clear that actual AIP payout can increase as Exelon Corp. earnings per share rises¹⁴, under certain realizations of the Company Performance Multiplier value.

¹⁴ Of course, Exelon EPS is only actually calculated once for any given AIP year. However, consistent with the probabilistic thinking employed by ComEd and described by Mr. Prescott (e.g. “You look at hitting your target 40 to 50 percent of the time”, Tr. at 264:1-3) Exelon EPS should be thought of as a random variable that could take various possible values under all the different contingencies that comprise all possible states of the world, just as the Company Performance Multiplier is a random variable.

Another ComEd witness reluctantly conceded the connection between the Shareholder Protection Feature and Exelon's EPS, but tried to downplay its operational significance. Mr. Prescott admitted in a discovery response that "one may argue" that the actual ComEd AIP payout in 2013 was "determined in part" by the Shareholder Protection Feature. AG Ex. 3.7 at 1. While Mr. Prescott has sought to characterize the Shareholder Protection Feature as a "second step" in the determination of actual AIP payout (Tr. at 257:7, 258:18), the mathematical algorithm for determining AIP payout, as described by ComEd and Exelon in AG Exhibits 1.7, 3.4, and 3.5, does not necessarily imply that the Shareholder Protection Feature must be considered after the Company Performance Multiplier. As Mr. Brosch stated in his rebuttal testimony, "one alternative way of describing the ComEd AIP is that the overall level of potential incentive payouts is first determined by the adjusted (non-GAAP) Exelon EPS, and then the actual payout within the resulting range is determined by the achievement of ComEd's operational KPIs." AG Ex. 3.0C at 28:633-637. For example, when Exelon Corp. earnings per share in 2013 was realized at 104.35%, the maximum level of AIP payout based on the Company Performance Multiplier was consequently capped at 124.35% -- twenty percentage points above 104.35% -- and then the actual Company Performance Multiplier was calculated as 140.39%, meaning that the effective, post-SPF Company Performance Multiplier was 124.35%.

As Mr. Brookins acknowledged during cross-examination, the existence of the Shareholder Protection Feature reduces the expected value of ComEd's employee compensation compared to a hypothetical scenario without the feature (Tr. at 114:20-115:4), independent of the KPI index. Brookins acknowledged that there is a risk each year that Exelon earnings per share could be above or below the target set in the Shareholder Protection Feature. Tr. at 329:2-5.

Moreover, he admitted that the Shareholder Protection Feature increases the uncertainty¹⁵ inherent in the final actual amount of ComEd AIP payout, compared to a hypothetical scenario without the Shareholder Protection Feature. Tr. at 329:7-12. Similarly, ComEd witness Mr. Wathen also admitted under cross-examination that whether the Shareholder Protection Feature will operate to reduce actual AIP payouts cannot be predicted with certainty at the start of any given year (Tr. at 113:22-114:4). More concretely, ComEd witness Mr. Prescott represented that the KPIs for purposes of calculating the Company Performance Multiplier for a given year are determined around December 31st while Exelon Corp.'s earnings per share for purposes of calculating the Shareholder Protection Feature is determined around the third week of the following January (Tr. at 275:8-13), so "there is that period of uncertainty" between the two dates regarding the actual amount of AIP payout (Tr. at 276:1-2)

The Shareholder Protection Feature Potentially Dilutes Employee Motivation.

Several ComEd witnesses insisted in their testimony that the alignment of AIP pay with operational KPIs is intended to incent ComEd employees to work toward the Company's realization of operational goals, but the totality of the evidence suggests otherwise. *See, e.g.*, ComEd Ex. 2.0 at 19:403-20:408 (Ms. Brinkman); ComEd Ex. 18.0 (Rev.) at 5:96-100 (Mr. Prescott); ComEd Ex. 19.0 at 14:265-268 (Mr. Brookins). However, as Mr. Brookins admitted during cross-examination, ComEd communicates the Shareholder Protection Feature to its employees each year in a way "designed to inform our employees that the amount of AIP earned could be limited by the Shareholder Protection Feature." Tr. at 320:1-19. ComEd witness Mr. Apple, President of IBEW Local 15, also admitted in a discovery response that IBEW members

¹⁵ There is already uncertainty in the ComEd AIP, because (as Mr. Wathen admitted during cross-examination) prior to any given year, the actual realization of the Company Performance Multiplier is uncertain, because the achievement of the KPIs is uncertain. Tr. at 112:4-9.

that are employed by ComEd receive information describing how their AIP incentive pay may be limited by Exelon Corp.'s earnings per share. AG Cross Exhibit 19 at 40. Mr. Prescott admitted in a discovery response that he does *not* believe that ComEd employees are unaware of press reports and financial forecasts regarding Exelon Corp. AG Ex. 3.7 at 3. Relatedly, Mr. Brookins admitted during cross-examination that Exelon Corp.'s EPS is publicly reported in financial media (Tr. at 330:20-22), from which we can infer that ComEd employees could go to Google.com, assuming they had internet access, and check "Exelon earnings per share" whenever they wanted. Moreover, Mr. Prescott also admitted that he does *not* believe that ComEd employees generally do not understand the Shareholder Protection Feature and are willing to strive for strong performance with respect to the KPIs without being surprised or disappointed when actual AIP payouts are limited by the Shareholder Protection Feature. AG Ex. 3.7 at 3. More directly, Mr. Brookins admitted in a discovery response that ComEd employees were "very proud" of their operational and cost control achievements in 2013 and were "disappointed" when their incentive compensation was limited by the SPF. AG Cross Exhibit 14 at 2. One can only guess as to how that disappointment might impact employee motivation to work toward operational goals in future years.

While some ComEd witnesses alleged that the existence of the Shareholder Protection Feature would have no effect on employee motivation to work toward achievement of the operational KPIs in the ComEd AIP (e.g. ComEd Ex. 32.0 at 3:55-64), this is difficult to believe given the admitted increased uncertainty caused by the Shareholder Protection Feature. As AG witness Brosch stated in his rebuttal testimony,

The premise of incentive compensation is that employees will respond to financial incentives in ways that produce tangible operational benefits and/or cost savings that exceed the costs of the additional compensation. Under this premise, insertion of a

Shareholder Protection Feature based upon Exelon EPS serves to dilute or completely eliminate the intended linkage between operational performance and the incentive payouts actually received by the employees.

AG Ex. 3.0C at 25:566-571. Moreover, “[i]f an EPS Shareholder Protection Feature has the effect of constraining the compensation paid to employees for exceptional operational performance, the employees’ focus can be expected to shift toward efforts that improve Exelon EPS, rather than focusing solely upon operational performance.” *Id.* at 25:571-26:575. Mr. Brosch stated flatly that “[i]f my compensation were driven by the EPS of my employer or its affiliate, I would monitor and seek to improve EPS performance in every way possible.” *Id.* at 27:604-606.

Mr. Brookins noted during his re-direct examination that ComEd reports Exelon Corp. earnings per share to employees each quarter, including earnings for that quarter and year-to-date earnings. Tr. at 349:11-15; *see also* Tr. at 352:11-17. Mr. Brookins admitted during cross-examination that, hypothetically, if the third quarter earnings guidance released in early November of a given year showed that the *projected* range of Exelon Corp. earnings per share for the *whole* year was entirely below the threshold level set in the Shareholder Protection Feature, then a hypothetical ComEd employee who fully understood¹⁶ the Shareholder Protection Feature would “recognize that there is a risk” that his or her AIP pay for the year could be reduced to zero. Mr. Brookins contended that such information would not affect ComEd employees’ motivation to work toward the Company Performance Multiplier KPIs for the remainder of November and December, because they would still be judged individually for the AIP Individual Performance Multiplier, individual salary, and future opportunities. Tr. at

¹⁶ ComEd communicates the Shareholder Protection Feature to its employees in a way “designed to inform our employees that the amount of AIP earned could be limited by the Shareholder Protection Feature.” Tr. at 320:1-19.

353:12-354:11. More generally, Mr. Brookins admitted that a hypothetical ComEd employee who understood the operation of the Shareholder Protection Feature would understand that his or her incentive pay could potentially be reduced depending on the realized value of Exelon Corp. earnings per share. Tr. at 320:20-321:4.

If considerations of individual salary and future opportunities are sufficient to properly motivate employees to work toward the operational KPIs (*see, e.g.*, Mr. Brookins's discussion of the importance of the Individual Performance Multiplier¹⁷ and other individual employee recognition in his surrebuttal testimony, ComEd Ex. 32.0 at 355-64), it is difficult to understand why AIP pay is necessary to motivate such achievement. On the other hand, if AIP pay is, in part, necessary to properly motivate employees to achieve the operational KPIs, which seems likely given the extensive discussion by ComEd witnesses of the importance of incentive pay to those operational goals, it is difficult to believe that the (hypothetical) recognition of a risk that AIP pay could be reduced to zero would not reduce employee motivation by any degree whatsoever. After all, Mr. Brookins stated earlier in cross-examination that "I agree that the ComEd employees are very motivated by achieving the AIP metrics and the multiplier that goes along with it," referring to the Company Performance Multiplier, and that employees' personal financial gain "can certainly contribute to their motivation." Tr. at 319:6-18. If employees are very motivated by personal financial gain toward increasing their AIP pay, it seems obvious how that motivation would be affected by an apparent risk of losing all AIP pay. ComEd witness Mr.

¹⁷ Mr. Brookins's discussion of the Individual Performance Multiplier is a red herring, because that also forms part of the AIP pay that would be reduced to zero if Exelon EPS fails to meet the threshold EPS level. Moreover, Mr. Brookins later admitted in a discovery response that the Individual Performance Multiplier goals or metrics are not defined as precisely the same as the Company Performance Multiplier KPIs, as they include individual performance goals and behavioral competencies. AG Cross Exhibit 14 at 1. While employees might be motivated to work toward operational KPIs by the prospect of individual recognition, it is difficult to believe that the negation of the prospect of AIP incentive pay in a given year would not affect their motivation.

Apple also admitted that “not every aspect of the AIP framework will be beneficial to IBEW members and that [the Shareholder Protection Feature] may operate to reduce the payout of incentive compensation when considered in isolation.” AG Cross Exhibit 19 at 2.

Mr. Brookins admitted that “it is in the personal interest of each of ComEd’s employees for the Shareholder Protection Feature not to be applied and limit the payout to ComEd employees.” Tr. at 324:3-6. It is easy to see that it is in the personal interest of ComEd employees, then, to maximize the probability that Exelon’s EPS will be high enough so as not to limit actual AIP payout, to the extent that such effort does not conflict with other goals. While Mr. Brookins described, during re-direct examination, a simple numerical illustration of how ComEd or a ComEd employee would need to incrementally increase capital expenditure by \$180 million in order to increase ComEd income by \$9 million and thus increase Exelon Corp.’s earnings per share by 1 cent (Tr. at 345:5-346:8), it is difficult to believe that, as he contended, that is the *only* way a ComEd employee could work to improve Exelon Corp.’s earnings per share. (Moreover, Mr. Brookins’s specific contention about capital expenditure is questionable, because he did not present any statements or evidence to support the implicit assumption that incremental capital expenditure by ComEd would not involve any new equity capital or new common equity shares at the parent company level that would impact the Exelon EPS calculation.)

For example, in this very proceeding, three ComEd employees and one Exelon Business Services Company employee (whose AIP pay is part of ComEd’s asserted revenue requirement) have submitted testimony in support of the inclusion of approximately \$39 million of AIP expense in the Company’s 2013 reconciliation revenue requirement. While ComEd’s 2015 financial performance may eventually be subject to a return-on-equity “true up” in 2017 if the

calculated return on equity is too low, pursuant to Section 16-108.5(c)(5) of EIMA, it is unclear whether that adjustment will be triggered.¹⁸ It is very possible that, should ComEd be denied recovery of the \$39 million of 2013 AIP expense in its 2013 reconciliation revenue requirement, the loss of that \$39 million in authorized 2015 revenue will be \$39 million¹⁹ that the Exelon family of companies will never get back, thus reducing 2015 Exelon EPS by over 2 cents per share, according to Mr. Brookins's math.²⁰ Because ComEd employees have a personal financial interest in seeing that the Shareholder Protection Feature not be triggered in 2015, they have a strong interest in putting effort toward litigating the incentive compensation issue in this proceeding – just to pick one example from many possible. Likewise, ComEd administrators of statutorily mandated energy efficiency programs pursuant to Section 8-103 of the Public Utilities Act have a clear incentive to ensure that energy savings goals are not exceeded, given Exelon Corp.'s energy supply business and the dynamic whereby ComEd receives greater distribution revenues with greater usage.

These are just two examples whereby ComEd employees could positively influence Exelon Corp. earnings per share. To be fair, ComEd is but one operating company in a large Exelon corporate family, so ComEd employees likely cannot influence Exelon EPS by more than

¹⁸ The size of the return on equity ("ROE") "collar" pursuant to Section 16-108.5(c)(5) of EIMA is 1 percent (50 basis points up from the allowed return on equity and 50 basis points down) of the distribution service equity balance, which was \$3.028 billion for 2013. ComEd Ex. 3.01, page 5 (Sch FR A-3), line 5. The size of the collar is thus \$30.28 million. The greatest impact that a revenue disallowance could have is that amount, assuming that ROE were at the very top of the collar without the disallowance. (Under such an assumption, any downward movement of more than \$30.28 of net income would be adjusted upward so that realized ROE were at the bottom of the collar.) But the net income effect of the People's proposed AIP disallowance is around \$23 million, as discussed in footnote 20 below.

¹⁹ To be fair, a dollar of revenue authorization does not translate automatically to a dollar of actual revenue, due to the uncertainty of usage, among other issues.

²⁰ \$39.145 million of incremental revenue minus the tax rate of 41.175% (ComEd Ex. 3.01, page 13 (Sch FR C-4), line 4) generates approximately \$23.03 million of after-tax income, which is over twice Mr. Brookins's assumed incremental income of \$9 million required to increase Exelon EPS by 1 cent.

a few cents, but it is undeniable that the incentive to do so exists and that a few cents of Exelon EPS could be pivotal in allowing a higher AIP payout, as discussed above.

ComEd's Motivation for the Shareholder Protection Feature Is Odd.

ComEd witness Mr. Prescott stated in a discovery response that the Shareholder Protection Feature “is intended to provide an indicator to the Exelon family of companies as to whether funds are available for incentive compensation pay in a given year.” AG Ex. 3.7 at 2. This is an odd motivation, however: if ComEd expects all AIP expense to be recoverable from ComEd ratepayers through its annual formula rate updates under EIMA – as, for example, 2012 AIP expense (which was not challenged by any party in Docket No. 13-0318) was, and as ComEd requests of the Commission in this proceeding – it is not clear why Exelon Corp. shareholders need “protection” from paying out AIP incentive pay to ComEd employees.

During cross-examination, Mr. Prescott also stated that the “purpose” of the Shareholder Protection Feature is so as not to “reward the wrong behaviors” or “create unintended consequences with your rewards”. Tr. at 259:2-6. While he did not explain what the “wrong behaviors” might be, the best inference is that employees’ contributing to successful achievement of operational KPIs while Exelon Corp. had an unexpectedly bad financial year would be the “wrong behaviors” in this framing. In such an event, the “right behaviors,” apparently, would be working to limit the achievement of KPI goals commensurate with the relatively poor achievement of Exelon EPS. By “unintended consequences” Mr. Prescott appears to have meant that paying out incentive pay when ComEd employees achieve operational targets but the parent company has a relatively poor financial year would be

somehow unintended.²¹ It is also not clear why payment of the full AIP amount determined by the Company Performance Multiplier without reference to the Shareholder Protection Feature would be an “unintended consequence” if the AIP expense could be recovered from ratepayers.²²

Programs like the Shareholder Protection Feature are not common among similar utilities. ComEd witness Mr. Wathen, an outside compensation consultant, stated in his testimony that “limiters or modifiers” such as the Shareholder Protection Feature in ComEd’s AIP “are found in investor-owned utility short-term incentive plans.” ComEd Ex. 20.0 at 9:167-168. However, under cross-examination, he admitted that only one out of the nineteen peer utilities in his study had a modifier based on financial metrics. Tr. at 119:8-12; *see also* AG Cross Exhibit 11 at 2.

Both Mr. Wathen (Tr. at 123:1-6; *see also* AG Cross Exhibit 11 at 4) and Mr. Prescott (Tr. at 266:10-13) agreed during cross-examination that, should the Commission hypothetically disallow recovery of ComEd’s 2013 AIP expense, ComEd could remove the Shareholder Protection Feature under the internal corporate rules of Exelon Corp. and ComEd. None of them suggested that outright cancellation of the AIP would be a likely outcome in the hypothetical event that the Commission disallowed recovery of all 2013 AIP expense based on the People’s arguments in this proceeding. In fact, Mr. Prescott stated flatly in his surrebuttal testimony that “ComEd intends to amend the plan.” ComEd Ex. 31.0 at 4:84-85. Mr. Wathen admitted that his only basis for believing that ComEd might “eliminat[e]” the AIP was an assumption of “many

²¹ During cross-examination, Staff counsel asked the following question to Ms. Brinkman, after discussing the operation of the EPS limiter (Tr. at 144:12): “And if you work hard all year and your peers work hard all year and the AIP award is high that’s earned, you might not get anything of your at-risk pay; correct?” Ms. Brinkman answered: “That’s the definition of at-risk pay, yeah.” Tr. at 145:5-9. Based on other statements by ComEd witnesses, the People understood the core definition of “at risk pay” to mean incentive compensation that might not be realized if operational goals are not met (*see, e.g.* ComEd Ex. 18.0 (Rev.) at 4:65-76) but Ms. Brinkman’s comment suggests that ComEd intends the risk to lie in the Shareholder Protection Feature’s threat to take away all incentive pay for non-operational reasons.

²² Indeed, it seems likely that *without* the Shareholder Protection Feature, neither the ICC Staff nor any intervening party would have challenged ComEd’s recovery of AIP expense in this proceeding.

possibilities that ComEd might pursue” (Tr. at 122:5-22) and that he had no opinion about whether ComEd would cancel the AIP in such a circumstance (Tr. at 117:4-8; *see also* AG Cross Exhibit 11 at 4). ComEd witness Mr. Apple, President of IBEW Local 15, stated in his testimony that “[i]f ComEd sought to discontinue portions of the IBEW incentive compensation package to address proposed disallowances in this proceeding, employees would essentially be taking a pay cut” (ComEd Ex. 21.0 at 3:68-4:70).²³ But, in a discovery response, he admitted awareness that ComEd or Exelon Corp. could revise the AIP plan and that he has no specific awareness of how ComEd or Exelon Corp. could or would respond if the Commission were to disallow recovery of ComEd AIP expense because of the Shareholder Protection Feature. AG Cross Exhibit 19 at 1.

The People do not disagree with ComEd’s repeated contentions that incentive pay based solely on operational goals is a good idea: in fact, they support it. And based on the above record evidence, the Commission should not take seriously ComEd’s efforts to imply that disallowance of 2013’s AIP expense, due to the Shareholder Protection Feature, would permanently end incentive compensation for ComEd employees. However, the Commission should also consider that *2013’s ComEd AIP expense is in the past*. It has been calculated and paid pursuant to the terms described in AG Exhibits 1.7 and 3.6 and ComEd Ex. 2.01. Any future removal of the Shareholder Protection Feature from ComEd’s AIP, effective in 2014, 2015, or beyond, would not convert the 2013 AIP into a lawful program. (The People will discuss at length below why the 2013 AIP was unlawful.)

While several ComEd witnesses, including Mr. Prescott (ComEd Ex. 18.0 (Rev.) at 9:170-174) and Ms. Brinkman (ComEd Ex. 12.0 (Rev.) at 7:131-139) sought to characterize the Shareholder Protection Feature as a “customer protection feature” or one that provides benefits

²³ Mr. Apple did not observe in testimony that the Shareholder Protection Feature itself caused a pay cut for ComEd employees in 2013, although he did acknowledge this in a discovery response. AG Cross Exhibit 19 at 39.

for customers by reducing Company expenses, it is not clear that the triggering mechanism of the Shareholder Protection Feature – Exelon Corp. earnings per share being lower than certain pre-set target levels – relates to any real need to protect customers from higher rates. As AG witness Brosch stated in his rebuttal testimony, “[i]f AIP awards payable for achievement of operational performance are excessive, this would be true without regard to Exelon’s achieved EPS.” AG Ex. 3.0C at 27:609-611. Additionally, it is unclear how or why a “customer protection” character of the SPF, if any, would save an otherwise unlawful incentive compensation program that is based on a corporate affiliate’s earnings per share.

The Chamber of Commerce Testimonies Should Be Given No Weight.

Just a few days before intervenor rebuttal testimony in this case was due in August, ComEd asked representatives of the Illinois Chamber of Commerce (“Illinois Chamber”) and Chicagoland Chamber of Commerce (“Chicagoland Chamber”) to intervene in this proceeding and file testimony supporting the ComEd AIP. Tr. at 62:22:63:19, 367:6-17. As discussed below, both representatives filed testimony supporting incentive pay and warning that the People’s proposal could lead to the end of ComEd’s AIP program. Prior to their conversations with ComEd on or around August 10th, neither of the two Chamber representatives were previously aware of the People’s proposal regarding incentive compensation. *Id.* Although several of the member companies of the Illinois Industrial Energy Consumers in this proceeding are also members of one or both of the two Chambers of Commerce, neither Chamber asked those companies for input before deciding to intervene and file testimony, with the exception of one company that was already represented on the Illinois Chamber’s Government Affairs Committee. Tr. at 65:12-67:5, 368:14-370-14; AG Cross Exhibit 16. Despite suggesting that they were testifying in support of incentive pay linked to operational goals (IL Chamber Ex. 1.0

at 3:58-65; CCC Ex. 1.0 at 5:96-103), both Chamber representatives later *denied* believing that actual ComEd AIP payout is unaffected by Exelon EPS. AG Cross Exhibit 1 at 1; AG Cross Exhibit 15 at 3.

The Illinois Chamber has historically seen Exelon Corp. and ComEd as unusually valued members of its organization. Mr. Maisch, President of the Illinois Chamber, stated that ComEd gave annual membership dues payments of approximately \$35,000 for each of the past four years, although the membership application on the Illinois Chamber's website lists \$11,000 as the maximum annual dues level. AG Cross Exhibits 3 and 4; Tr. at 67:7-69:12. Mr. Maisch said that "a dozen of" members give above the \$11,000 level annually (Tr. at 69:16); for context, the Illinois Chamber has "thousands" of members according to Mr. Maisch (Tr. at 66:6). Both of the most recent Annual Report and the most recent Chairman's Report on the Illinois Chamber's website feature a photograph at an Exelon Corp. nuclear power plant – in both reports, the only corporate logo featured alone.¹ AG Cross Exhibit 5 at 5; AG Cross Exhibit 6 at 12; Tr. at 73:3-9, 74:2-10. Mr. Maisch's explanation for the prominent featuring of the Exelon plant photograph was that "I can only tell you that must have been the best photos they snapped that day" (Tr. at 74:11-12; *also see* Tr. at 76:15-16), although he did not explain why, despite the existence of additional photo opportunities at other companies' facilities (Tr. at 77:2-5), there were no other equally attractive photographs with "wide open space" (Tr. at 77:9) taken in the entire year or years covered by the reports. The most recent Chairman's Report also lists ComEd and Exelon Corp. among the "Key Investors" on the final page (AG Cross Exhibit 6 at 21), while the Illinois Chamber website shows ComEd among the Key Investors (AG Cross Exhibit 1 at 4); Mr. Maisch described the Key Investor companies as "people that carry a lot of water for us in a lot of different ways, including revenue." Tr. at 75:3-5.

Mr. Maisch suggested in testimony that Mr. Brosch is “seeking to erase” the Shareholder Protection Feature from the ComEd AIP (IL Chamber Ex. 1.0 at 6:126), and also that Mr. Brosch’s proposal would have the effect of “dismantling incentive compensation in its entirety” (*id.* at 7:128-129; *see also* AG Cross Exhibit 7 at 4). However, he admitted in a data request response and under cross-examination that he has *no contention as to how ComEd would actually respond if the Commission hypothetically disallowed AIP expense recovery*, and that ComEd could “do any of a number of things”, with “many options to consider.” AG Cross Exhibit 7 at 2; Tr. at 77:20-78:11. He admitted that “I don’t know what ComEd would do” under the hypothetical Commission disallowance (Tr. at 79:22) and that he was not even aware of whether ComEd *can* remove the Shareholder Protection Feature (AG Cross Exhibit 7 at 3; Tr. at 80:16-81:1).

Similarly, Exelon Corp. and ComEd have a long-standing relationship with the Chicagoland Chamber. Mr. Carpenter of the Chicagoland Chamber admitted under cross-examination that Exelon Corp. or ComEd have asked the Chicagoland Chamber in the past to do lobbying on their behalf, and that at times, “to the extent that their agenda agrees with ours,” the Chicagoland Chamber has been “supportive of it.” Tr. at 365:22-366:11. He also admitted that ComEd and Exelon Corp. gave around \$140,000 to the Chicagoland Chamber in each of 2012 and 2013. Tr. at 371:15-21; AG Cross Exhibit 17. Asked how many companies give at least that much annually, Mr. Carpenter was unaware of the number but noted that “we have several large companies that are big supporters of the Chamber.” Tr. at 372:2-13.

Mr. Carpenter’s rebuttal testimony states that “Mr. Brosch’s proposal could have the odd result of deleting the limiter and thus passing along to customers the full amount of annual incentive compensation calculated under ComEd’s AIP” (CCC Ex. 1.0 at 8:161-162) and also

that Mr. Brosch's proposal "would likely undo pay at risk compensation altogether" (*id.* at 8:155), but he then admitted in a discovery response that he "makes no contention as to how ComEd would respond if the Commission were to disallow" AIP expense recovery based on the SPF, and that "ComEd could do any of a number of things to modify the AIP framework including removal of the Shareholder Protection Feature." AG Cross Exhibit 15 at 2. He thus clarified under cross-examination that the quote from his testimony starting at line 155 should be fairly rendered as "*could likely*" (Tr. at 375:21-376:3) and that he had no opinion of the relative probabilities of the two possible outcomes mentioned in his testimony (Tr. at 376:5-8). Mr. Carpenter stated in cross-examination that he believes that the Shareholder Protection Feature is *not* based on Exelon Corp. earnings per share (Tr. at 377:5-9), a view unsupported by the plain language of Exelon's AIP guide. Mr. Carpenter stated that he knows that the Shareholder Protection Feature "could cause the ComEd AIP [payout] to be lesser than it would be otherwise" but *admitted that he has no working knowledge of the provision* or any understanding of what would cause the "limiter" to be invoked. Tr. at 377:13-22.

In summary, there are many good reasons why the Commission should not give weight to the testimony filed by the two Chamber representatives.

Section 16-108.5 of the Public Utilities Act Requires 100% Disallowance of ComEd's Requested 2013 AIP Expense.

The controlling legal rule for recovery of incentive compensation by large electric utilities in Illinois is found in Section 16-108.5(c)(4)(A) of EIMA, 220 ILCS 5/16-108.5(c)(4)(A), which provides that the Commission's formula rate for EIMA-electing electric utilities must

Permit and set forth protocols, subject to a determination of prudence and reasonableness consistent with Commission practice and law, for the following:

(A) recovery of incentive compensation expense that is based on the achievement of operational metrics, including metrics related to budget controls, outage duration and frequency, safety, customer service, efficiency and productivity, and environmental compliance. Incentive compensation expense that is based on net income or an affiliate's earnings per share shall not be recoverable under the performance-based formula rate.

The discussion below will show why, under Section 108.5(c)(4)(A), ComEd's 2013 AIP expense was based on an affiliate's²⁴ earnings per share and thus is not recoverable.

1. The Jurisprudence of 'Based On' Supports Disallowance.

As discussed above, the factual contours of ComEd's 2013 AIP and its Shareholder Protection Feature are largely undisputed. The main *legal* question for resolution of this issue is how to interpret the statutory term "based on". If ComEd's 2013 actual AIP expense is "based on" the earnings per share of Exelon Corp., its corporate parent (and thus its affiliate), then the expense is not recoverable. While this question has not been previously litigated since the EIMA amendments to the Public Utilities Act were passed in 2011, the 7th Circuit Court of Appeals recently considered the meaning of the term "based on" in a federal criminal sentencing law, 18 U.S.C. § 3582(c). The statutory provision applied expressly to "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" and authorized the federal district court to reduce the sentence in such situations. *Id.* In the case at bar, there was "no question that the Commission lowered the sentencing range for crack-cocaine offenses." *U.S. v. Ray*, 598 F.3d 407, 409 (7th Cir. 2010). Thus, the 7th Circuit needed only to decide whether the defendant had been sentenced "based on" the federal Sentencing Guidelines. *Id.* The defendant's plea agreement had "provided that the government would move the court 'to depart from the applicable

²⁴ As a preliminary matter, the People note that it is undisputed that Exelon Corp., the parent company of ComEd, is an "affiliate" of ComEd for purposes of Section 108.5(c)(4)(A).

sentencing guidelines range ... and to impose the specific sentence agreed to by the parties.” *Id.* The Court noted that “it seems most unlikely that the agreed sentence was arrived upon by chance and without regard to the Guidelines, which presumably featured prominently in the parties' negotiations.” *Id.* Despite this plausible connection between the agreed sentence and the Guidelines, the Court stated its holding clearly:

Does the plea agreement *clearly* reflect an intent to tie the sentence to the Guidelines so that, if the Guidelines are subsequently adjusted, the sentence should be similarly adjusted? If so, the sentence may be said to be “based on” the Guidelines. Here, however, there is no indication of such an intent.

Id. Thus, the 7th Circuit held that the defendant’s sentence was not “based on” the Sentencing Guidelines.

In the instant matter, the Shareholder Protection Feature, based on Exelon EPS, establishes a potential range for AIP payout as a percentage of the target opportunity, as discussed above. (Where the actual payout falls within that range would be determined by the achievement of operational KPIs and thus the aggregate Company Performance Multiplier.) AG Exhibit 1.7, the Exelon AIP guide, clearly reflects an intent to shrink the range of potential payout to the extent that the performance percentage of Exelon Corp. EPS falls lower, or to increase the range of potential payout to the extent that realized Exelon Corp. EPS falls higher (as in the hypothetical New Year’s Eve example explored during cross-examination with Ms. Brinkman, Tr. at 169:2-173:10). If the top of the SPF-determined range falls below the realized value of the Company Performance Multiplier and thus becomes a binding constraint, then, under the express terms of the Shareholder Protection Feature, any upward or downward movement of Exelon EPS (compared to what was expected, or compared to what was

preliminarily calculated) necessitates a like adjustment of actual AIP payout. Under the 7th Circuit's logic, AIP expense is clearly "based on" Exelon EPS.

An alternate approach to interpreting the term "based on" comes from two slightly older cases from near the turn of the millennium. In an Illinois appellate case in 2001, a high school student had injured herself on school grounds and sued the school district. The district moved to dismiss based on a statute that provides immunity to local public entities "where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes." 745 ILCS 10/3-106. Interpreting this statutory language, the Fifth District held that "[t]he plain and ordinary meaning of the phrase 'liability is based on' is that the entity's duty must be *derived from* its control of the property" (emphasis added). *Manuel v. Red Hill Community Unit School Dist. No. 10 Bd. Of Educ.*, 324 Ill.App.3d 279, 284 (5th Dist. 2001). The interpretation of "based on" as meaning "derived from" is echoed by a 1999 7th Circuit opinion, *U.S. v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999). Considering statutory language from the federal False Claims Act at 31 U.S.C. § 3730(e)(4)(A)²⁵ providing that "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information", the 7th Circuit set about trying to interpret the meaning of "based upon." The Court considered various Circuits' views before settling on the Fourth Circuit's interpretation that "based upon" means "derived from." *Id.* at 863.

In the instant proceeding, the amount of ComEd's actual AIP expense is clearly based on or "derived from" the level of Exelon Corp. non-GAAP earnings per share for 2013. Because

²⁵ That subsection of the federal False Claims Act was amended by the Patient Protection and Affordable Care Act, Public Law 111-148, in March 2010, so that the "based upon" language no longer appears today.

Exelon EPS at approximately 104% of target was a binding constraint to the calculated Company Performance Multiplier of approximately 140%, had Exelon Corp.'s EPS been one cent higher or one cent lower than \$2.49, ComEd's actual AIP payout would have been slightly higher or lower than it actually was. The evidence shows that Exelon Corp. earnings per share was integral to determining the amount of actual AIP payout or expense. Hence, it is entirely reasonable and appropriate for the Commission to conclude that AIP expense was "derived from" Exelon EPS.

2. Commission Precedent Supports Disallowance.

Several prior Commission orders mentioned by Staff witness Bridal (Staff Ex. 8.0 at 22:508-26:619) support the disallowance of ComEd's 2013 AIP expense in this proceeding because it is based on Exelon Corp.'s earnings per share.

In Docket Nos. 06-0070/0071/0072 (cons.), the Commission denied 100% of the Ameren utilities' test-year incentive compensation expense, which had the following restriction, as stated in Ameren's own filing: "If the organization does not meet pre-defined EPS goals (as stated in the Plans), incentive awards are not available."²⁶ The Commission found that, under the Ameren incentive plans, "all operational goals are depending upon meeting the EPS target first" and thus it decided to "disallow[] funding measures that primarily depend on meeting financial goals."²⁷ Similarly, in ComEd's 2013 AIP, the payout of *any* incentive pay depends on Exelon's meeting the pre-set threshold non-GAAP EPS level (set at \$2.22 in 2013).

In fact, parent company financial targets have consistently led to Commission disallowance of incentive pay. For example, in Docket No. 07-0507, the Commission denied recovery of 100% of Illinois-American Water Company's test-year incentive compensation

²⁶ Order, Docket Nos. 06-0070/0071/0072 (cons.), November 21, 2006, at 69 (available at <http://www.icc.illinois.gov/downloads/public/edocket/186116.pdf>).

²⁷ *Id.* at 72.

expense because it was dependent on the parent company's reaching certain financial performance targets.²⁸ In Docket No. 07-0585, the Commission allowed recovery of only 50% of the Ameren Illinois Utilities' test-year incentive compensation expense, because the *other* 50% of incentive compensation was dependent on the parent company's meeting financial targets.²⁹

In Docket No. 05-0597, the Commission found that 50% of ComEd's test-year incentive compensation expense was based on Exelon EPS³⁰ and thus disallowed recovery of that amount.³¹ While Ms. Brinkman asserted in a discovery response in this proceeding that "an Exelon EPS limiter with a minimum threshold EPS performance applied to the entire AIP award," AG Cross Exhibit 13 at 2, ComEd's testimony in Docket No. 05-0597 specified that the EPS-based Shareholder Protection Feature for the test year in that rate case applied only "to performance on operational metrics which exceed the target level" of operational goals, and also that ComEd was not seeking inclusion in rates of any of the above-target operational-based AIP pay.³² This is a crucial difference from the operation of the Shareholder Protection Feature in ComEd's 2013 AIP, which could potentially reduce AIP pay to 0% of target opportunity even when the Company Performance Multiplier achievement were below target, such as 10%.

²⁸ Order, Docket No. 07-0507, July 30, 2008, at 26-27 (available at <http://www.icc.illinois.gov/downloads/public/edocket/227276.pdf>).

²⁹ Order, Docket No. 07-0585, September 24, 2008, at 107-108 (available at <http://www.icc.illinois.gov/downloads/public/edocket/230646.pdf>).

³⁰ Order, Docket No. 05-0597, July 26, 2006, at 91 (available at <http://www.icc.illinois.gov/downloads/public/edocket/178278.pdf>).

³¹ *Id.* at 96. See also ComEd Ex. 18.0 (Rev.) at 9:184-10:186 (admission by Mr. Prescott that, in Docket No. 05-0597, "the Commission disallowed recovery of 50% of ComEd's AIP – the portion that was based on EPS").

³² Docket No. 05-0597, ComEd Ex. 13.0 at 18:410-415 (available at <http://www.icc.illinois.gov/downloads/public/edocket/162087.pdf>); see also Docket No. 05-0597, ComEd Ex. 19.0 at 49:1079-1082 (available at <http://www.icc.illinois.gov/downloads/public/edocket/162106.pdf>).

In Docket No. 05-0597, ComEd submitted for rate recovery *only* those AIP expenses which, by the terms of the AIP (as reported by ComEd in testimony), could never be based on Exelon Corp. earnings per share. Additionally, the Initial Briefs³³ and the Reply Briefs³⁴ filed by the People and the ICC Staff in that proceeding do not appear to mention ComEd's Shareholder Protection Feature that applied to the operational-based AIP payouts for that test year, and the Order in that docket does not appear to mention the Shareholder Protection Feature, either.³⁵ Even if the structure of the Shareholder Protection Feature connected to ComEd's AIP in that proceeding were comparable to the Shareholder Protection Feature at issue this year (which it is not), it is difficult to draw any inferences about the Commission's policy on the matter when it did not even discuss the feature.

The Appellate Court upheld the Commission's disallowance of the 50% of test-year AIP expense in Docket No. 05-0597 that was based on Exelon EPS in *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 398 Ill.App.3d 510 (2nd Dist. 2009). Here, the Court held that "the Commission could have reasonably concluded that the earnings-per-share portion of the plan provided only a tangential benefit to ratepayers", 398 Ill.App.3d 510, 552. The Court also held that "the notion that an earnings-per-share-based employee incentive plan provides benefits to shareholders is hardly a controversial proposition", *id.* at 553. This holding remains good law today.

³³ See Docket No. 05-0597, Initial Brief of the People of the State of Illinois, April 25, 2006, available at <http://www.icc.illinois.gov/downloads/public/edocket/170610.pdf>; Docket No. 05-0597, Reply Brief of the Staff of the Illinois Commerce Commission, April 25, 2006, available at <http://www.icc.illinois.gov/downloads/public/edocket/170626.pdf>.

³⁴ See Docket No. 05-0597, Reply Brief of the People of the State of Illinois, May 11, 2006, available at <http://www.icc.illinois.gov/downloads/public/edocket/172316.pdf>; Docket No. 05-0597, Reply Brief of the Staff of the Illinois Commerce Commission, May 11, 2006, available at <http://www.icc.illinois.gov/downloads/public/edocket/172335.pdf>.

³⁵ See Order, Docket No. 05-0597, July 26, 2006, at 90-97.

In Docket No. 07-0566, the Commission disallowed “100% of AIP costs related to the financial net income goal which primarily benefits shareholders.”³⁶ While Ms. Brinkman asserted in a discovery response in this case that ComEd’s 2006 AIP plan at issue in Docket No. 07-0566 “contain[ed] an Exelon EPS limiter” and that ComEd provided the plan information to the parties during discovery (AG Cross Exhibit 13 at 5), during cross-examination she was unable to say whether that information was entered into the record in Docket No. 07-0566. Tr. at 183:16-184:1. A review of the Initial Briefs dated May 29, 2008 filed by ComEd³⁷, the People³⁸, Staff³⁹, IIEC⁴⁰, and CUB⁴¹ in that proceeding shows that, while the parties debated the incentive compensation issue spiritedly, no party mentioned any Exelon EPS limiter, and the Commission’s Order⁴² similarly did not mention it.

ComEd’s first rate case following passage of EIMA in October 2011 was Docket No. 11-0721, which set a revenue requirement for 2012 based on 2010 expenses. Under ComEd’s 2010 AIP program, a ComEd net income limiter was in place – but it applied to limit 2010 pay “only if the composite payout exceed[ed] target level,” according to a discovery response by ComEd entered into that proceeding’s record by the ICC Staff.⁴³ Thus, it did not have the potential to reduce actual AIP payout all the way to zero, as the Shareholder Protection Feature in 2013’s

³⁶ Order, Docket No. 07-0566, September 10, 2008, at 61 (available at <http://www.icc.illinois.gov/downloads/public/edocket/229809.pdf>). See also ComEd Ex. 18.0 (Rev.) at 10:189-191 (admission by Mr. Prescott that in Docket No. 07-0566, “the Commission disallowed recovery of the portion of ComEd’s AIP that was based on the net income goal”).

³⁷ <http://www.icc.illinois.gov/downloads/public/edocket/223353.pdf>.

³⁸ <http://www.icc.illinois.gov/downloads/public/edocket/223357.pdf>.

³⁹ <http://www.icc.illinois.gov/downloads/public/edocket/223352.pdf>.

⁴⁰ <http://www.icc.illinois.gov/downloads/public/edocket/223385.pdf>.

⁴¹ <http://www.icc.illinois.gov/downloads/public/edocket/223366.pdf>.

⁴² Order, Docket No. 07-0566, September 10, 2008, at 54-61.

⁴³ Docket No. 11-0721, Staff Ex. 13.0, February 24, 2012, Attachment A, available at <http://www.icc.illinois.gov/downloads/public/edocket/313571.pdf>, 27th page of PDF.

AIP did. Moreover, while the net income limiter was calculated to be 102.9% for 2010 and the KPI index⁴⁴ was 110.3% for that year, seemingly creating a binding constraint of 102.9% on AIP payout, ComEd leadership decided under the CEO Discretionary Feature to increase the net income limiter to 112.9%, according to a separate discovery response from ComEd entered into the record.⁴⁵ As Staff suggested in briefing, as summarized by the Commission, “[t]he net income limiter feature is deceiving . . . because management can at its discretion increase that limit with board approval.”⁴⁶ In other words, ComEd incentive pay for 2010 was *not* based in any way on net income, because as actual experience revealed, the CEO Discretionary Feature rendered the net income limiter non-operational; the purported constraint had no bite. No party argued that the net income limiter *per se* warranted disallowance of recovery of all 2010 AIP pay, and, regardless of what parties may have said, the Commission had no reason to disallow ComEd AIP expense for 2010 based on a § 16-108.5(c)(4)(A) argument.⁴⁷ While ComEd witness Brinkman suggested in her surrebuttal testimony in this proceeding that “[a]pplying the logic behind the Commission’s decision in Docket No. 11-0721 to this case would result in allowing recovery of exactly what ComEd has requested – 124.4% – the amount of AIP paid out after applying the limiter” (ComEd Ex. 25.0 at 4:67-69), the Shareholder Protection Feature in ComEd’s 2013 AIP is nothing like the net income limiter in ComEd’s 2010 AIP.

⁴⁴ This index was akin to the Company Performance Multiplier in the 2013 ComEd AIP.

⁴⁵ *Id.* at Attachment B (same URL, 28th page of PDF).

⁴⁶ Order, Docket No. 11-0721, May 29, 2012, at 89 (available at <http://www.icc.illinois.gov/downloads/public/edocket/322042.pdf>).

⁴⁷ The Commission *did* disallow some of ComEd’s 2010 AIP pay for a different reason: “a cap on incentive compensation benefits that are recoverable through rates is necessary, given the potential for manipulation between the two incentive compensation programs” [the second program being the Long-Term Incentive Plan], *id.* at 90. The Appellate Court, First District later upheld this decision in *Commonwealth Edison Co. v. Ill. Commerce Comm’n*, 2014 IL App (1st) 122860 (March 26, 2014), at ¶¶ 62-65.

Subsequently, the Commission in both of Docket Nos. 12-0321 and 13-0318 did not discuss in its respective Orders any ComEd net income limiter or Exelon EPS limiter applicable to the 2011 or 2012 ComEd AIPs, respectively, and no party mentioned any such limiter in briefs. ComEd confirmed in a discovery response that incentive compensation was an uncontested issue in Docket No. 12-0321 (AG Cross Exhibit 13 at 5; *see also* Staff Ex. 8.0 at 27:664), and ComEd witness Prescott was unable to say during cross-examination whether it was a contested issue in Docket No. 13-0318 (Tr. at 267:4-16, 295:20-296:13). In fact, it is clear from the Docket No. 13-0318 order that the Shareholder Protection Feature in the ComEd AIP was also an uncontested issue there.⁴⁸ Although the several rate cases from 2005 through 2007 discussed above are very instructive, no lesson can be drawn from any of ComEd's previous three formula rate cases as to whether ComEd's 2013 AIP expense based on the Shareholder Protection Feature should be recoverable or not.

3. The Alternative Proposals Offered By Staff and ComEd Have No Sound Basis.

Both Staff and ComEd have offered alternative proposals to the People's proposed 100% disallowance of ComEd AIP expense. Staff witness Mr. Bridal suggests in his rebuttal testimony that the Commission use the same 102.9% allowance percentage as it used to decide the contested incentive compensation issue in Docket No. 11-0721. ICC Staff Ex. 8.0 at 33:781-784. However, as discussed above, the 102.9% in Docket No. 11-0721 related to the percentage that ComEd would have paid before its Compensation Committee intervened and upended the terms of the 2010 AIP to increase that year's AIP pay. The lawfulness of ComEd's net income

⁴⁸ See Order, Docket No. 13-0318, December 18, 2013, at 38 ("The incentive compensation program expenses at issue in this docket are: (1) ComEd's Long-Term Performance Share Awards Program ("LTPSAP"), and (2) incentive compensation associated with ComEd's energy efficiency employees"), available at <http://www.icc.illinois.gov/downloads/public/edocket/365294.pdf>.

limiter was not at issue in Docket No. 11-0721, and the Commission’s decision in that proceeding, as discussed above, was not an endorsement of the legality of the net income limiter. Because the issues related to AIP incentive pay differ significantly between Docket No. 11-0721 and the instant proceeding, there is no prudential or legal basis to import the Commission’s approved AIP expense recovery cap from that proceeding into this one.

Ms. Brinkman of ComEd proposed a different alternative in her surrebuttal testimony: “If the Commission chooses to impose an alternative limiter in this case, it should consider the facts of this case. Looking at ComEd’s historical performance of the operational metrics and total payout since the adoption of EIMA, ComEd has performed on and paid AIP at the following levels:

Earned AIP Based on Operational Metrics		Actual Payout
2011	133.2%	133.2%
2012	148.4%	115.0%
2013	140.4%	124.4%
Three Year Average	140.7%	124.2%

Viewing this trend, the Commission could consider imposing a limit of 124.2% on the 2013 ComEd AIP plan. This alternative uses a three year average that considers the facts specific to the 2013 plan as well as ComEd’s operational performance and total payout trend since the adoption of EIMA.” ComEd Ex. 25.0 at 6:105-112. In cross-examination, however, Ms. Brinkman admitted that her only reason for using a three-year average was that three years of expenses have been reconciled by the Commission since EIMA was adopted in 2011. Tr. at 158:20-159:2. Moreover, Ms. Brinkman was unable to say during cross-examination whether any other elements of ComEd’s asserted revenue requirement in this case are based on a three-year average of expenses. It is also not clear what “facts of this case” justify ignoring the plain unlawfulness of the Shareholder Protection Feature and instead using a three-year average. Ms. Brinkman’s alternative proposal lacks any legal or prudential basis and should be ignored.

In summary, prevailing legal precedents, taken with the factual contours of the 2013 ComEd AIP and its Shareholder Protection Feature, require 100% disallowance of 2013 ComEd AIP expense.

Disallowance of LTPSAP Expense

Following the recommendation of AG witness Mr. Brosch, the People also recommend the disallowance of 100% of ComEd's 2013 Executive Long Term Performance Share Award Program ("LTPSAP") expense. First, it is instructive to consider what the Commission stated in last year's formula rate update proceeding in disallowing all of ComEd's 2012 LTPSAP expense:

The Commission agrees with CCI, Staff, and the AG that ComEd has failed to meet its burden in demonstrating that any portion of its Long-Term Performance Share Awards Program ("LTPSAP") satisfies the requirements under Illinois law for inclusion in rates. The EIMA is explicit that incentive compensation based on net income or an affiliate's earnings per share shall not be recoverable under a performance-based rate. 220 ILCS 5/16-108.5(c)(4)(A). The LTPSAP is based on the operational and financial performance of all subsidiaries of Exelon, ComEd's parent company. These award grants depend on a management committee's subjective assessment of the performance of all Exelon subsidiaries. There are no direct payout percentages assigned to any of the goals; thus, it cannot be determined what portion of an award is related to ComEd's operational performance and what weights were given to metrics related to EPS and the operations of other Exelon subsidiaries. ComEd retains the burden of proof, even in the new formula rate structure, to establish the justness and reasonableness of its proposed rates or other charges. *See* 220 ILCS 5/16-108.5(c); 220 ILCS 5/9-201(c). Staff's attempt to devise an approximation of the portion of LTPSAP attributable to Exelon's growth and performance (a position abandoned by Staff in its briefs) does not suffice when ComEd has not met its burden to demonstrate what portion of these executive incentive compensation awards are sufficiently related to ComEd's operational performance to justify inclusion in rates. The EIMA

thus prohibits recovery of any arbitrary portion of the LTPSAP and it is disallowed from recovery in its entirety.⁴⁹

As AG witness Brosch observed in his direct testimony, the “metric weighting” values in the LTPSAP are not discretely calculated and applied based solely upon ComEd performance. Instead, as ComEd admitted in a discovery response, for two of the operational goals, equally weighted values for all three Exelon Operating Companies, including Philadelphia Electric (“PECO”), Baltimore Gas & Electric (“BGE”), and ComEd, enter into the calculation for purposes of LTPSAP achievement. AG Ex. 1.8 at 2. Thus, the relative weight afforded operational performance at ComEd is only one-third the weight used in the Company’s modified disallowance. AG Ex. 1.0C2 at 26:601-605. Additionally, the LTPSAP payouts remain subject to an overall Total Shareholder Return (“TSR”) modifier that can increase or decrease overall LTPSAP plan awards by up to 25%, which is a larger overall weighting than has been afforded the CAIDI and SAIFI factors relied upon for ComEd’s proposed 13.5 percent recovery rate. AG Ex. 1.0C2 at 26:606-609; AG Ex. 1.8 at 3-6; ComEd Ex. 2.01 at 12-13. Finally, according to Confidential Attachment 1 to ComEd’s response to data request AG 1.17, included as AG Exhibit 1.9, the weighted average results achieved in 2013 under Exelon’s LTPSAP totaled 147.8 percent, but “[t]he Compensation Committee of the Exelon Board of Directors reviewed the results of the LTPSA plan and limited the total payout percentage to 125%.”

As Mr. Brosch stated in his direct testimony, this type of subjective, high-level modification of LTPSAP calculated results is not supportive of ComEd’s assertion that 13.5 percent of payouts under the plan are now directly tied to ComEd operational performance. AG Ex. 1.0C2 at 27:619-621. ComEd witness Brinkman stated in her direct testimony that ComEd’s

⁴⁹ Order, Docket No. 13-0318, December 18, 2013, at 44-45, available at <http://www.icc.illinois.gov/downloads/public/edocket/365294.pdf>.

LTPSAP plan was changed in 2013 “to directly assign payout percentages to individual goals allowing for greater transparency regarding what portion of an award is related to ComEd’s operational performance and what portion(s) related to EPS metrics and the operations of other Exelon subsidiaries.” ComEd Ex. 2.0 at 27:552-555. While it is true that individual performance goals have now been given a quantified weighting (*see* ComEd Ex. 2.01 at 17), it is still true that awards are based on the performance of multiple Exelon subsidiaries and affiliates, including PECO, BGE, and Exelon Nuclear. Moreover, the majority of plan metrics are driven by financial performance, with 30% of the LTPSAP award based on the return on equity of Exelon Corp. and another 30% based on funds from operations (“FFO”) as a ratio of outstanding debt. The Total Shareholder Return feature remains, as does the Compensation Committee’s power to make *ad hoc* reductions to LTPSAP expense.

Because ComEd is now, as of its rebuttal testimony, seeking recovery of only 5.7% of 2013 recorded LTPSAP expenses (ComEd Ex. 12.0 at 11:217-244), the People recommend disallowance of the 5.7% that ComEd seeks to include in revenue requirement, for the reasons stated above

Conclusion on Incentive Compensation

For the reasons stated above, the Commission should find that 100% of ComEd’s 2013 AIP expense was based on the earnings per share of Exelon Corp. and thus is not recoverable in rates. The Commission should also disallow all of the Exelon Business Services Company AIP expense that has been included in ComEd’s asserted revenue requirement, for the same reason. The Commission should also disallow all of the portion of ComEd’s LTPSAP expense that it seeks to include in revenue requirement. The numerical impact upon revenue requirement of the

People's proposed adjustments are found at AG Exhibit 3.1, page 2 (\$39,145,065 for the AIP adjustment) and page 3 (\$187,437 for the LTPSAP adjustment).

- b. Key Manager Long Term Performance Plan ("LTPP")
 - c. Long-Term Performance Share Awards Program ("LTPSAP")
3. Collection Agency Costs

VI. RATE OF RETURN

VII. RECONCILIATION

A. OVERVIEW

B. POTENTIALLY CONTESTED ISSUES

1. Calculation of Interest on Reconciliation Balance Net-of-Tax

The statute creating the new formula rate process is clear: the formula must "[p]rovide for the recovery of the utility's actual costs of delivery services that are prudently incurred and reasonable in amount consistent with Commission practice and law." 220 ILCS 5/16-108.5(c)(1) (emphasis added). The statute further requires the formula to provide for an annual reconciliation of the revenue requirement established for a calendar year and the subsequently determined "actual" revenue requirement for that year. 220 ILCS 5/16-108.5(c)(6) and (d)(1). The statute provides that the reconciliation shall be recovered or refunded "with interest calculated at a rate equal to the utility's weighted average cost of capital approved by the Commission for the prior rate year." *Id.*

Consistent with the overall purpose of the statute to enable the utility to recover its actual costs, the interest charge is intended to compensate the utility for the time value of money for the period of time it must finance the reconciliation balance. The General Assembly directed that

the interest rate equal the “utility’s weighted average cost of capital approved by the Commission for the prior rate year,” but did not specify how to determine the amount to which the interest should be applied. However, consistent with the statute’s overall purpose to match revenues with costs, the Commission should only apply the interest rate to amounts that the utility will actually have to finance during the reconciliation period. Stated differently, interest should be applied to only the net cash flow that was foregone by the utility while awaiting recovery of the reconciled revenue requirement.

In responding to the Commission’s stated interest in additional information about the People’s recommendation to apply interest to the net-of-tax reconciliation balance, AG witness Effron explained how the reconciliation balance is calculated. He pointed out that “[t]he actual reconciliation revenue requirement appears on Schedule FR A-1-REC. As can be seen on Lines 16-20, there is a ‘gross-up’ of the return component to provide for income taxes.” AG Ex. 2.0 at 7:145-147. Moreover, “The reconciliation revenue requirement implicitly includes any income taxes due on the difference between the actual revenue requirement and the revenue requirement in effect.” *Id.* at 7:151-153.

Mr. Effron demonstrated that the reconciliation balance presented by ComEd actually is made up of several components, including revenues representing a return for shareholders (the return on equity) and revenues that will be used to pay taxes in the year the revenues are received. *Id.* at 8:169-171. While shareholders have a claim to the revenues representing the additional income that is due them, entitling them to interest on that amount during the reconciliation period, they have no claim on the revenues recovered to pay taxes. *Id.* at 8:172-174. As Mr. Effron pointed out:

It would be inequitable and unreasonable to allow ComEd to recover interest costs from customers on a balance due to the

government, which is what the deferred taxes on the reconciliation balance represent.

To allow the Company to recover interest on a balance due a third party violates the most basic principles of utility ratemaking. Yet this is what happens if the reconciliation balance on which interest is accrued is not reduced for applicable income taxes. To avoid this inequitable and unreasonable result, the balance on which interest is accrued should be reduced by applicable deferred income taxes.

Id at 8:174-182. (emphasis added). Significantly, the income tax is not due or paid until after the reconciliation revenue is actually received, eliminating any actual financing costs to the ComEd. *Id.* at 9:186-187; AG Ex. 1.0C2 at 5 (When the cash recovery of reconciliation revenues is delayed, the cash payment of related income taxes is also delayed.”).

Mr. Effron presented AG Exhibit 2.1 showing the calculation of taxes on the reconciliation balance. While the reconciliation amount, or the actual revenue requirement Additional Net Income Required to Earn the Authorized ROE was \$133,293,000, consumers will pay an additional \$93,300,000 for the taxes ComEd will pay when this revenue is received, resulting in a total reconciliation charge of \$226,593,000. AG Ex. 2.0 at 9:191-200; AG Ex. 2.1. There is no dispute that consumers will provide ComEd with the revenues necessary to cover the \$93,300,000 in taxes. However, consumers should not pay interest on that tax amount now because (1) it is not payable in cash until after the revenues are received, as Ms. Brinkman revealed in her rebuttal testimony, ComEd Ex. 12.0 (Rev.) at 29:606-608, and (2) therefore ComEd does not need to finance that amount pending recovery of the reconciliation revenues.

The interest associated with the reconciliation balance excluding the \$93,300,000 in taxes due the government after reconciliation revenues are received equals \$20,099,000, which is \$14,068,000 less than the \$34,167,000 calculated by the Company. AG Ex. 2.0 at 9:197-199.

This results in a total “Reconciliation with Interest” that should appear on ComEd Ex. 3.01, Sch. A-4, line 31 of \$246,692,000. *Id.* at 9:200; AG Ex. 2.1.

AG witness Mr. Brosch explains the issue somewhat differently, but arrives at the same conclusion as Mr. Effron. According to Mr. Brosch:

It is useful to consider the net cash flow benefit ComEd was denied when its cash revenues charged to ratepayers in 2013 were not sufficient to fully fund the Company’s delivery service revenue requirement in that year. This is important because reconciliation interest should be charged to ratepayers only as needed to compensate ComEd for the incremental financial investment that was required by the Company’s net cash revenue shortfall. If we assume cash revenues were under- recovered by \$230 million in 2013, which is the amount estimated by ComEd that was recorded as both a regulatory asset and an increase to book revenues in its FERC Form 1, the avoided cash payment of income taxes on this accrued book adjustment to revenues was approximately \$95 million. This means that ComEd’s actual foregone net cash flow in 2013 was not the full \$230 million of revenues recorded within the regulatory asset, but instead was this amount of foregone revenue reduced by the foregone incremental cash income taxes that were not payable in 2013. Using these values, ComEd was denied net cash flow of \$135 million in 2013 when both the accrued book non-cash revenues and the avoided cash income tax payments on those revenues are considered.

AG Ex. 1.0 at 14:323-15:338. Mr. Brosch presented in his rebuttal testimony an example where another state’s public utilities commission, in this case Hawaii, recently found that income tax deferrals should be recognized as an offset to the balance of accrued revenues that is allowed to earn interest within the Revenue Balancing Accounts of the Hawaiian Electric Companies (“HECO Companies”) A short-term-debt cost interest rate was ordered for application to deferred revenue balances, and the HECO Companies were then ordered to seek and obtain IRS approval for an income tax accounting method change to secure the same income tax deferral benefits that are enjoyed by ComEd and Ameren Illinois Company in Illinois. After obtaining IRS approval for such accounting, the HECO Companies have modified their interest calculations applicable to their

deferred revenue regulatory asset balance, so as to employ a net-of-income-tax approach. AG Ex. 3.0C at 17:378-389. Relevant documents from that proceeding in the Hawaii Public Utilities Commission were entered into evidence as AG Exhibit 3.2.

EIMA is intended to provide the utility with the recovery of its actual costs. It would be unreasonable and inconsistent with ComEd's actual tax liability to compensate it with interest as if it paid taxes before the reconciliation revenues are received. However, that is the effect of ComEd's application of interest to the reconciliation under-collection, increased for taxes. AG Ex. 2.0 at 7. The People request that the Commission adjust the reconciliation balance to reflect the net-of-tax under-collection, and restate the interest applicable to the reconciliation under-collection to \$20,099,000, representing an adjustment of \$14,068,000 to the Company's requested interest amount.

2. In The Absence Of A Direct Reconciliation Tax Adjustment, The Commission Should Include The ADIT Recorded On ComEd's Books As A Delivery Related Item.

Both AG witnesses David Effron and Michael Brosch have testified that the most accurate way to account for the interest on ComEd's reconciliation balance is to recognize that it will not have an income tax expense related to the reconciliation revenues until it receives those revenues. However, in ComEd's 2013 formula rate docket, the Commission declined to adopt their recommendation because it was concerned that the statute did not expressly authorize the net-of-tax adjustment. Docket 13-0318, Order at 63 (Dec. 18, 2014). In a related docket to amend the formula to reflect the net-of-tax treatment the Commission declined to adopt the People's recommended net-of-tax reconciliation, the Commission stated:

While there may be merit to the AG and CCI's proposal and while there may be some debate as to the plain meaning of the Act, the Commission is troubled by the fact that although Section 16-108.5(d)(1) fails to prohibit such accounting treatment, the

converse is also true—it does not appear to require or even reference it. Further, as ComEd points out, where the Act does intend that adjustments be made to an amount of a balance, it has done so specifically, as in the case of projected plant additions which are to be included on a net basis considering updated depreciation reserve and expense, 220 ILCS 5/16-108.5(c)(6), or in the ROE collar calculation where the utility is required to apply a credit or charge that “reflects an amount equal to the value of that portion of the earned rate of return on common equity that is more than 50 basis points higher [or lower] than the rate of return on common equity calculated pursuant to paragraph (3) of this subsection (c)...for the prior rate year, adjusted for taxes.” 220 ILCS 5/16-108.5(c)(5).

The Commission would note that this is not the first time the clarity of this subsection concerning the reconciliation balance has been called into question and that the legislature has already once amended it. Thus, it is difficult for the Commission to support an interpretation of the Act which reads into it exceptions, limitations, or conditions the legislature did not express. *Davis v. Toshiba Machine Co.*, 186 Ill.2d 181, 184-185 (1999). Considering all the arguments presented regarding the meaning of Section 16-108.5(d)(1), the Commission cannot at this time support the AG and CCI’s interpretation. For purposes of this proceeding, ComEd is entitled to the full reconciliation balance with interest calculated at a rate equal to the utility’s weighted average cost of capital approved by the Commission for the prior year. 220 ILCS 5/16-108.5(d)(1). In the future, if further arguments from the parties are presented or clarity from the legislature is provided on this topic, the Commission will revisit the issue.

Docket No. 13-0553, Final Order at 43 (Nov. 26, 2013). The People have presented the interpretation of EIMA and specifically the Commission’s decision not to make the accounting adjustment necessary to apply the interest to the actual amount subject to financing, to the Appellate Court. See Case No. 14-0275, Appellate Court of Illinois, First Judicial District.

The People have presented additional explanation and justification for the net-of-tax reconciliation interest expense calculation. However, should the Commission decline to adopt the interest offset approach presented by Mr. Effron in this docket, and also not remove the

ADIT associated with the reconciliation revenues as recommended in the alternative by AG witness Michael Brosch, consumers will be required to provide ComEd a return on non-investor funds as well as paying interest on income taxes that have not been paid. A deduction to the delivery services rate base to remove the Accumulated Deferred Income Taxes, or ADIT, associated with the reconciliation balance is necessary to protect consumers from paying interest on the non-investor-supplied ADIT funds arising from ComEd's delayed receipt of reconciliation revenues. AG Ex. 1.0C2 at 7:157-161.

Mr. Brosch explained that "[u]tilities are capital-intensive businesses that invest continuously in newly constructed or acquired assets. These large annual capital investments generate persistently large income tax deductions for bonus/accelerated depreciation and other tax deductions and credits that must be recognized by recording ADIT under Generally Accepted Accounting Practices ("GAAP") rules. ... [ADIT] represents a significant source of capital to the utility." *Id.* at 7:163-175.

ADIT balances represent a form of zero-cost capital to the utility created by the income tax savings permitted under tax law. The Commission routinely recognizes ADIT balances as rate base reductions in electric delivery service and other rate proceedings so that consumers do not provide the utility with a return on this non-investor resource. The Appellate Court in *Ameren Ill. Co. v. Ill. Comm'rce Comm'n*, 2013 IL App (4th) 121008, ¶ 34 explained ADIT as follows:

ADIT quantifies the income taxes that are deferred when the tax law provides for deductions with respect to an item in a year other than the year that the item is treated as an expense for financial reporting purposes." (Internal quotation marks omitted.) *Ameren Illinois Co. v. Illinois Commerce Comm'n*, 2012 IL App (4th) 100962, ¶ 11, 967 N.E.2d 298. For regulated utilities, ADIT reduces the utility's rate base because it is treated as no-cost capital. *Ameren Illinois Co.*, 2012 IL App (4th) 100962, ¶ 11, 967

N.E.2d 298. In other words, ADIT represents taxes payable in the future that provide a source of funds the utility can use until such time the taxes become due.

In that decision the Court affirmed the Commission's deduction of ADIT from Ameren's rate base in its annual formula rate review. *Id.* at ¶ 40.

ComEd has recognized jurisdictional ADIT generally in this case. See ComEd Ex. 13.01, Sch. B-1, Line 17 & App. 4. However, ComEd only deducts "jurisdictional" ADIT, or deferred taxes related to Illinois delivery operations. As pointed out by AG witness Brosch, "ComEd has cumulatively recorded \$164.9 million of ADIT, representing the deferred income taxes associated with the Company's cumulative reconciliation balance as of December 31, 2013." AG Ex. 1.0 at 8. However, ComEd treats this ADIT balance as if it were non-jurisdictional.

ComEd suggests that this ADIT can be ignored notwithstanding its association with the EIMA reconciliation process that plainly stem from Illinois jurisdictional delivery services. ComEd argues that the reconciliation balance is not included in rate base so the associated ADIT should not be treated as jurisdictional. *See, e.g.*, ComEd Ex. 25.0 at 26:513-522. However, if the reconciliation balance to which interest is applied has not been reduced for ADIT, this argument has the effect of retaining the reconciliation-related ADIT benefits for shareholders, by forcing consumers to pay interest on this non-investor capital. Stated differently, allowing WACC-based interest to the full reconciliation balance is comparable to including the reconciliation balance in rate base, by making ratepayers responsible for a return on this investment.

The Commission should resist ComEd's request to put form over substance. EIMA specifically defined the way the reconciliation balance is treated. The law requires that the reconciliation under-collection be recovered in a single rate year, beginning one year after the

close of the reconciliation year (costs as of December 31, 2013 recovered beginning January 1, 2015). *See* 220 ILCS 5/16-108.5(d). Rather than being recovered as a regulatory asset that is included in rate base and receives a rate base return, the statute specifies that the reconciliation under- (or over-) authorization be subject to an interest rate equal to the weighted average cost of capital. *Id.* at 5/16-108.5(d)(1). By specifying that the reconciliation under-authorization is subject to interest, rather than a rate base return, the statute creates the premises that must be accommodated while at the same time applying the established regulatory and legal standards as required by Section 16-108.5(c) and (d)(3) (“The Commission shall apply the same evidentiary standards, including, but not limited to, those concerning prudence and reasonableness of costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of the Act.”)

It is well-established that ADIT represents non-investor capital. *E.g., Ameren, supra*; AG Ex. 2.0 at 7-8. It is also without question that ComEd has recorded \$164.9 million in deferred taxes arising from the Company’s right to receive the reconciliation revenues in the future. AG Ex. 1.0C2 at 8:191-194. The question then becomes whether the Commission has the power to protect consumers given the fact that ComEd has \$164.9 million in deferred tax benefits associated solely with the reconciliation recovery. As Mr. Brosch explained, “...distribution service ratepayers will provide a full return on this regulatory asset in the form of interest at the WACC. There is no basis to treat reconciliation-related ADIT balances as if they are non-jurisdictional in setting formula delivery service rates. Yet this non-jurisdictional treatment is precisely how ComEd has accounted for its recorded reconciliation-related ADIT balances.” AG Ex. 1.0C2 at 8:199-9:203.

The Appellate Court has affirmed the Commission’s power under EIMA to deduct ADIT from rate base even when that authorization is not expressly stated. *Ameren*, 2013 IL App (4th) 120081 at ¶ 37 (“Ameren argues the Modernization Act did not provide the Commission with the authority to deduct ADIT because, while the statute provides guidance for other adjustments, the statute fails to mention an adjustment for ADIT”). The Court, recognizing the function of ADIT and its provision of non-investor capital, stated: “As it was consistent with the common practice of the Commission to include ADIT in the ratemaking process, we conclude the Commission did not err by including the ADIT adjustment for projected plan additions in its ratemaking calculation.” *Id.* at ¶ 40.

Both AG witnesses Effron and Brosch have recommended that the Commission account for the fact that ComEd will not pay income taxes on the reconciliation balance until the reconciliation revenues are actually received by the company. Therefore, consumers should not be required to pay interest on that tax liability as part of the reconciliation recovery. If the Commission declines to make the adjustment recommended by Mr. Effron and discussed in subsection 1 above within the interest calculation, the People request that, in the alternative, the Commission recognize ComEd’s recorded ADIT balance as a deduction to rate base. Adoption of one of these options is essential so that consumers do not pay (1) interest on the deferred reconciliation-related income taxes before they are due while (2) the ADIT amount recorded on ComEd’s books is ignored and benefits only the Company’s shareholders. The revenue requirement effect of this alternative adjustment is shown at AG Exhibit 3.1, page 1.

VIII. REVENUES

A. OVERVIEW

B. POTENTIALLY CONTESTED ISSUES

1. Billing Determinants

Billing determinants are used to establish the rates that produce that revenue requirement authorized by the Commission. AG Ex. 2.0 at 5; ComEd Ex. 2.0 at 46. Consistent with the prior formula rate cases, in this docket AG witness Effron recommended that the billing determinants for 2015 include the effect of the growth in customers associated with ComEd's 2014 plant additions included in rate base. AG Ex. 2.0 at 5-6.

The Appellate Court in its review of Docket No. 11-0721 described the billing determinant issue as a "population adjustment" based on the fact that ComEd had "proposed the building of new facilities to accommodate growth in the number of customers it serves." 2014 IL App (1st) 122860 at ¶ 19. The Court related the People's position that "without any adjustment for the expected increase in the number of customers... ComEd will systematically collect sums in excess of its revenue requirement." *Id.* The Court concluded that ComEd had not shown that the law precluded this adjustment, that the Commission had acted "contrary to the manifest weight of the evidence," or that the Commission acted "unreasonably." *Id.* at ¶¶ 57-58. In its review of the Commission's decision in Docket 12-0321, the Court again affirmed the Commission and further found ComEd collaterally estopped from further challenging the Commission's authority to make this adjustment. 2014 IL App (1st) 130302 at ¶¶ 50-62. Ms. Brinkman agreed during cross-examination that the Appellate Court twice ruled against ComEd on this issue. Tr. at 192:7-9.

No adjustment needs to be made to implement Mr. Effron's billing determinants recommendation. It supports the adjustment made by ComEd consistent with the recent Appellate Court rulings on the issue. The Commission should adopt the rate design ComEd has proposed that includes service to customers associated with the projected plant additions included in rate

base under the formula. See 220 ILCS 5/16-108.5(c)(5). This adjustment is consistent with the adjustments affirmed by the Courts in their recent reviews of the Commission's decisions concerning ComEd's formula rates.

IX. COST OF SERVICE AND RATE DESIGN

A. OVERVIEW

B. POTENTIALLY UNCONTESTED ISSUES

1. Embedded Cost of Service Study
2. Distribution System Loss Factor Study
3. Secondary and Service Loss Study

X. OTHER

A. OVERVIEW

B. POTENTIALLY UNCONTESTED ISSUES

C. POTENTIALLY CONTESTED ISSUES

XI. CONCLUSION

For all of the reasons stated above, the People of the State of Illinois respectfully request that the Commission enter an Order consistent with the recommendations in this Initial Brief.

Respectfully submitted,

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by LISA MADIGAN, Attorney General

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